a

MAJLIS PERBANDARAN PETALING JAYA

v.

JF INDUSTRIAL PRODUCTS & SUPPLIES SDN BHD

b

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
ABDUL MALEK AHMAD JCA
AHMAD FAIRUZ JCA
[CIVIL APPEAL NO: B-02-563-1996]
27 NOVEMBER 1997

c

ARBITRATION: *Agreement - Limitation of time - Application for extension of time - Discretion of the court - Arbitration Act 1952, s. 28*

d

By virtue of an agreement between the parties, the appellant appointed the respondent to build a recreational park in Kelana Jaya. Clause 54(c) of the said agreement provided that any dispute or difference between the parties must be referred to arbitration within 45 days after the superintending officer ("the SO") failed to give a decision or if the respondent was dissatisfied with the SO's decision, as the case might be.

e

Due to a delay in completion, an extension of time was granted by the appellant to the respondent. However, due to non-completion, the agreement was subsequently terminated by the appellant by letter. The respondent then appealed to the appellant to review its decision and also sent complaints to the other parties involved in the agreement.

f

After a lapse of three and a half years the respondent applied to the High Court by originating motion for extension of time to initiate arbitration proceedings as the period prescribed in the agreement had expired. It also applied for leave of court to appoint an arbitrator for the purpose of its claim against the defendant/appellant. The High Court granted the respondent an extension of time and hence the present appeal by the appellant.

g

Held:
Per Abdul Malek Ahmad JCA

h

[1] It is quite clear that under s. 28 of the Arbitration Act 1952 the court has the discretion to extend the time which has expired depending on whether in the circumstances of the particular case, undue hardship will be caused if the extension is not granted.

i

[2] Before the court can exercise its discretion to extend time for referrence to arbitration where time has lapsed, it must consider each case on its own particular facts.

[3] The facts in the instant case indicated that the respondent took too long a time to apply for the extension of time, namely three and a half years. This period was inordinate in the circumstances. The fact that the respondent wrote three letters to the appellant at the rate of one per year trying to sort things out would surely not make the delay excusable. The termination of the agreement by the appellant was only after a further extension of time had been given to the respondent to complete. There were no meetings held after the termination. With the period of 45 days prescribed in the agreement and with over RM800,000 at stake, the first thing on the respondent's mind should have been to sort out the dispute by referring the matter to arbitration immediately. By failing to do so, the respondent had placed the hardship upon itself in the circumstances.

[Appeal allowed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Menurut satu perjanjian antara pihak-pihak itu, perayu telah melantik responden untuk membina bagi pihak mereka, sebuah taman rekreasi di kelana Jaya. Fasal 54(c) Perjanjian tersebut memperuntukkan bahawa sebarang pertikaian atau perbezaan antara pihak-pihak itu mestilah dirujuk kepada timbangtara dalam tempoh 45 hari selepas Pegawai Penyelia ('SO tersebut') gagal memberikan keputusan atau jika responden tidak berpuashati dengan keputusan SO sepertimana keadaannya.

Disebabkan kelewatan penyiapan, satu perlanjutan masa telah diberikan oleh perayu kepada responden. Walaubagaimanapun. disebabkan oleh ketidak-siapan, perjanjian tersebut telah kemudiannya ditamatkan oleh perayu melalui surat. Responden kemudiannya telah merayu kepada perayu supaya mengkaji-semula keputusan mereka dan juga mengirimkan aduan-aduan kepada pihak-pihak lain yang terlibat dalam perjanjian tersebut.

Selepas luputnya masa selama 3½ tahun responden telah memohon kepada Mahkamah Tinggi melalui saman pemula untuk perlanjutan masa untuk memulakan prosiding timbangtara oleh kerana tempoh yang ditetapkan dalam perjanjian tersebut telah luput. Mereka telah juga memohon untuk mendapatkan kebenaran mahkamah untuk melantik seorang timbangtara bagi tujuan tuntutan mereka terhadap defendan/perayu. Mahkamah Tinggi telah memberikan responden perlanjutan tempoh masa dan ini telah mengakibatkan rayuan semasa oleh perayu.

Diputuskan:
Oleh Abdul Malek Ahmad HMR

[1] Adalah jelas bahawa di bawah s. 28 Akta Timbangtara 1952, mahkamah mempunyai bidangkuasa untuk melanjutkan masa yang telah luput bergantung peda mana-mana satu kes yang khusus, kesukaran yang tidak sewajarnya akan disebabkan jika perlanjutan masa itu tidak diberikan.

[2] Setiap satu kes mesti selalunya bergantung pada fakta-faktanya yang khusus sebelum mahkamah boleh melaksanakan budicaranya samada untuk melanjutkan masa bagi merujuk kepada timbangtara dalam sesuatu situasi di mana masa telah pun luput.

[3] Fakta-fakta dalam kes semasa ini menunjukkan bahawa responden mengambil masa yang terlalu lama untuk memohon bagi mendapatkan perlanjutan masa itu, iaitu selama 3½ tahun. Tempoh ini dalam keadaan itu dianggapkan keterlaluan. Hakikat bahawa responden telah menulis tiga pucuk surat kepada perayu pada kadar sepucuk surat setahun, dalam usaha untuk meleraikan perkara-perkara pastinya tidak menjadikan kelewatan itu sesuatu yang boleh dimaafkan. Penamatan perjanjian itu oleh perayu telah hanya dilaksanakan selepas satu perlanjutan yang seterusnya diberikan kepada responden untuk menyiapkannya. Tidak terdapat mesyuarat atau pertemuan yang telah diadakan selepas penamatan itu. Dengan tempoh selama 45 hari yang ditetapkan dalam perjanjian itu dan wang sejumlah RM800,00 berada dalam keadaan yang tidak menentu, perkara utama dalam pemikiran responden ialah bagaimana hendak menyelesaikan pertikaian itu dengan merujukkannya kepada timbangtara dengan kadar yang segera. Dengan kegagalan responden berbuat sedemikian, mereka telah meletakkan kesusahan itu pada diri mereka.

[Rayuan dibenarkan.]

Cases referred to:
Irish Agricultural Wholesale Society Ltd v. Partenreederei: MS "Eurotrader" ("the Eurotrader") [1987] Vol 1 Llyods Law Reports 418 ***(refd)***
Liberian Shipping Corp "Pegasus" v. A King & Sons Ltd [1967] 2 QB 86 ***(refd)***
Safety Insurance Co Sdn Bhd v. Chow Soon Tat [1975] 1 MLJ 193 ***(refd)***

Legislation referred to:
Arbitration Act 1952, s. 28
Arbitration Act 1950 [UK], s. 27

[Appeal from High Court, Shah Alam; Originating Summons No: 24-81 of 1996]

For the appellant - Gideon Tan; M/s Gideon Tan & Razali
For the respondent - SS Ravichandran; M/s Seah, Balan, Ravi & Co

Reported by Ling Hea Hoon

JUDGMENT

Abdul Malek Ahmad JCA:

The respondent, who was the plaintiff in the court below, had applied by originating motion filed on 12 February 1986 for extension of time to initiate arbitration proceedings as the period prescribed in the agreement had expired. They had also applied for leave of the court to appoint an arbitrator for the purpose of their claim against the defendant, the appellant before us, for RM833,628.53.

The parties had entered into an agreement on 30 September 1981 where the respondent had been appointed to build a recreational park in Kelana Jaya for the appellant. Construction work was scheduled to be completed on 7 March 1992 but because of the delay in completion, an extension was granted by the appellant to 2 June 1992. Due to the non-completion, the contract was terminated by the appellant on 31 August 1992 by letter dated 17 August 1992.

The relevant clause in the contract is cl. 54(c) which reads:

> 54(c) If the S.O. fails to give a decision for a period of forty-five (45) days after being requested to do so by the Contractor or if the Contractor be dissatisfied with any decision of the S.O., then in any such case the Contractor may within forty-five (45) days after the expiration of forty-five (45) days after he had made his request to the S.O., or forty-five (45) days after receiving the decision of the S.O., as the case may be, require that such dispute or difference be referred to arbitration and final decision of a person to be agreed between parties to act as the Arbitrator. The arbitration shall be held at the Regional Centre for arbitration at Kuala Lumpur, using the facilities and assistance available at the centre.

Under cl. 1 of the agreement, the initials "S.O." stand for "Superintending Officer" who shall be the Director of the Department of Gardens and Recreation in the appellant.

On 17 November 1992 the respondent appealed to the appellant to review the decision. They also sent complaints to other parties and only after a lapse of three and a half years did they file this originating motion in the High Court.

Section 28 of the Arbitration Act 1952 reads:

> Where the terms of an agreement to refer future disputes to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given, or an arbitrator is appointed, or some other step to commence arbitration proceedings is taken, within a time fixed by the agreement and a dispute arises to which the agreement applies, the High Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may, on such terms, if any, as the justice of the case may require, but without prejudice to any written law limiting the time for the commencement of arbitration proceedings, extend the time for such period as it thinks proper.

It is, therefore, quite clear that the High Court has the discretion to extend the time which has expired depending on whether in the circumstances of any particular case, undue hardship would be caused if the extension is not granted.

We must mention at this juncture that the relevant notes of evidence was only two pages long which we consider scanty for an application of this nature. The decision unfortunately was equally brief where the learned trial judge granted the order in terms stating three main grounds in three short sentences. They were that there was a claim for RM833,628.53 against the defendant, that the reply of the defendant was not satisfactory, and that there was no prejudice to the defendant which had been so conceded to by the defendant. There was no written judgment.

In *Liberian Shipping Corporation "Pegasus" v. A. King & Sons Ltd* [1967] 2 QB 86, the Court of Appeal (Lord Denning, MR and Salmon, LJ) held, by a two to one majority in allowing the appeal, that in all the circumstances of that case, time to refer to arbitration should be extended, for undue hardship would otherwise be caused to the claimants if they had to forfeit forever a substantial claim for damage to their vessel merely because of their excusable oversight about the time limit. Further, they held that negotiations with the charterers had been proceeding throughout the three-month period and a few days' delay could not prejudice the charterers in any way.

The dissenting judge (Harman, LJ) was of the opinion that s. 27 of the English Arbitration Act 1950 (hereinafter "the Act") should be construed consistently with the decided cases, which show that the power to extend time should not be exercised in favour of claimants who are themselves at fault, unless the respondents have caused or contributed to the mistake, for to extend time is to deprive the respondents of vested rights under the contract. He held that although there was hardship in that case, it was not "undue hardship" as the two terms were, in effect, quite different. The trial judge (Donaldson, J) had

refused to extend the time on the ground that although there was hardship, it was not "undue hardship" within the narrow meaning given to those words in s. 27 of the Act.

In *Safety Insurance Company Sdn Bhd v. Chow Soon Tat* [1975] 1 MLJ 193, a fire insurance policy had been taken out by the respondent to insure his construction materials at a work site. A fire occurred at the work site on 30 December 1968 causing the total destruction of the respondent's store. The respondent submitted a claim of $154,702.55 on 5 January 1969, but the appellant did not write to the respondent rejecting his claim or making a counter-offer. The respondent was therefore unable to refer the matter to arbitration within the prescribed period of one year from the happening of the loss or damage. It was only on 20 June 1972 that the appellant informed the solicitors for the respondent that it was repudiating liability under condition 19 of the policy which relieved it from any liability after the expiration of twelve months from the date of the fire. The appellant maintained that since the respondent had failed to resort to arbitration under condition 18 of the policy within twelve months of the date of the fire, the respondent's right to arbitration was time barred. The respondent thereupon applied for enlargement of time. In the High Court, Mohamed Azmi, J, as he then was, allowed the application and the appellant appealed to the Federal Court.

It was held by the Federal Court that in these circumstances, the respondent had made out a case of undue hardship, that is, greater hardship than the circumstances warrant or hardship greater than that which in justice, a claimant should be called upon to bear. It also ruled that the learned trial judge in this case had exercised his judicial discretion correctly in granting the extension of time on the ground of undue hardship as he had taken all the relevant factors into account in the exercise of his discretion and there was nothing wrong in the way in which he had dealt with the application.

As to why the respondent had not referred to arbitration during the prescribed period in cl. 54(c) of the agreement in this appeal, the reasons given were as follows:

a) the President of the appellant had asked for time to study the matter as he had been newly appointed;

b) the appellant had sent a letter to the respondent stating that they wished to settle the claim of the respondent under the agreement and therefore the respondent was of the view that the appellant had wished to settle through negotiations;

c) the appellant, through their Secretary of the Council, had promised that all the respondent's claims would be scrutinised by the full Council at their meeting;

d) the appellant had requested the respondent to send the details of the accounts and had promised to get in touch with the respondent once the account had been scrutinised;

e) the respondent had tried to get assistance from third parties to settle the matter without going to court.

Learned counsel for the appellant argued that these reasons had not been substantiated. It was, therefore, wrong for the trial judge to say that there was no prejudice to the appellant. He added that after all this delay, the value of evidence given would become less.

In *Irish Agricultural Wholesale Society Ltd. v. Partenreederei: M.S. "Eurotrader" ("the Eurotrader")* [1987] Vol. 1 Lloyd's Law Reports 418, the charterers had applied for an extension of time under s. 27 of the Act. It was held by the trial judge (Steyn, J) that despite the absence of prejudice to the owners, weighing on the one hand the length of the delay and on the other the consequence to the charterers of being unable to pursue their claim, the Court was not satisfied that the justice of the case required an extension of time to be granted; a refusal would cause no undue hardship. On the application for leave to appeal by the charterers, the Court of Appeal (Kerr and Nourse, LJJ) ruled that:

a) on the material before the court it was perfectly clear that the judge did not err in principle in any way and there was no basis for the Court of Appeal to interfere with the exercise of his discretion under s. 27 of the Act;

b) the time limit formed part of the contract between cargo and ship and was designed to ensure that claims were dealt with quickly; the jurisdiction under s. 27 of the Act fell to be exercised in that context, not in the context of insurers or lawyers on either side;

c) while allowing for the fact that insurers and lawyers were bound to be involved on both sides and that this might lengthen the lines of communication, it was vital not to lose sight of the fact that s. 27 of the Act must be applied with reference to the position of the contracting parties; and as soon as the time point had been taken the charterers should have acted accordingly; they failed to do so and there was nothing wrong with the learned judge's conclusion that the delay became culpable to a

high degree in that it was likely to have serious consequences in the context of s. 27 of the Act;

(d) accordingly, the appropriate order was to refuse leave to appeal.

Learned counsel for the respondent replied that in the earlier cases cited, the courts had taken a narrow interpretation but subsequently, as seen in the *Liberian* case *(supra)*, there had been a change of heart.

He had referred to *Safety Insurance Company Sdn. Bhd. v. Chow Soon Tat (supra)* where at the High Court level, Mohd. Azmi, J, as he then was, in referring to the *Liberian* case *(supra)* had said:

> In construing s. 28, it is relevant to refer to the case of *Liberian Shipping Corporation v. A. King & Sons Ltd. (supra)* in which s. 27 of the English Arbitration Act 1950, which is in *pari materia* with our s. 28, was considered by the Court of Appeal in England. In that case, it was held that an extension of time for arbitration may be granted under s. 27 even though the claimant himself is at fault. On the question of "undue hardship", Denning LJ said at p. 938:
>
> > It does appear that in the past the courts have been inclined to emphasise the word 'undue', and to say that if a man does not read the contract and is a day or two late, it is a 'hardship'; but it is not an 'undue hardship', because it is his own fault. I cannot accept this narrow interpretation of the statute. These time-limit clauses used to operate most unjustly. Claimants used to find their claims barred when, by some oversight, they were only a day or two late. In order to avoid that injustice, the legislature intervened so as to enable the courts to extend the time whenever 'in the circumstances of the case undue hardship would otherwise be caused'. 'Undue' there simply means excessive. It means greater hardship than the circumstances warrant. Even though a claimant has been at fault himself, it is an undue hardship on him if the consequences are out of proportion to his fault.
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> At p. 940 Salmon LJ in his judgment said:
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> > That section seems to me to state quite plainly that if, having considered all the circumstances of the case, the court comes to the conclusion that the hardship imposed by the form of the arbitration clause on the claimant is greater than that which, in justice, he should be called on to bear, the time within which to appoint an arbitrator may be extended by the court. I do not believe that the courts are entitled to read words into this section which are not there and which would have the effect of cutting down the power given to the courts by the plain language of the section itself.

In construing whether the court should exercise its power under s. 27, Salmon LJ at p. 943 gave the following guidelines:

> I am not prepared to hold that the court's power under the section should be very rarely exercised. Still less that they should be exercised freely. The question whether those powers should or should not be exercised must turn exclusively on the particular facts of each case in which the question arises.
>
> In considering this question the court must take all the relevant circumstances of the case into account: the degree of blameworthiness of the claimants in failing to appoint an arbitrator within the time; the amount at stake, the length of the delay; whether the claimants have been misled, whether through some circumstances beyond their control it was impossible for them to appoint an arbitrator in time. In the last two circumstances which I have mentioned, which do not arise here, it is obvious that normally the power would be exercised; but those are not the only circumstances and they are not, to my mind, necessary circumstances for the exercise of the power to extend time. I do not intend to catalogue the circumstances to be taken into account, but one very important circumstance is whether there is any possibility of the other side having been prejudiced by the delay.
>
> From the above judgment and from the plain words of our s. 28, the High Court has a wide discretion to extend the time fixed for arbitration for such period as it thinks proper provided it is of the opinion that in the circumstances of the case undue hardship would otherwise be caused. As stated by Lord Justice Salmon, the question whether the power should or should not be exercised must turn exclusively on the facts of each case in which the question arises. The power can be exercised even in cases where the applicant is at fault if the consequences are out of proportion to his fault and greater hardship would be caused than the circumstances warrant.

The Federal Court in that same case in the penultimate paragraph said:

> The main issue in this appeal is whether the court below exercised its judicial discretion correctly on the facts before it. It is contended for the appellants that in the circumstances of the present case there cannot be a finding of undue hardship within its definition in the case law. I do not agree. It is true that there was inordinate delay on the part of the respondent in making the application for extension of time, but that is not the only factor to be considered. The latest pronouncement on the difficult question of undue hardship, by a major decision of the English Court of Appeal in *Liberian Shipping Corporation v. A. King & Sons Ltd. (supra)*, is that undue hardship merely means greater hardship than the circumstances warrant or hardship

> greater than that which, in justice, the claimant should be called upon to bear. That the learned trial judge took all the relevant considerations into account in the exercise of his discretion to grant extension of time is abundantly clear from his grounds of judgment, and I can find nothing wrong in the way in which he dealt with the application and in the conclusions to which he arrived.

Learned counsel had continued that if the decision was otherwise, they would suffer undue hardship as they would lose their claim for over RM800,00. On the facts of the case, he added, the appellant only wanted to rid themselves of their liability and responsibility. He had referred to the letters sent by the respondent to the appellant on 1 November 1992, 1 December 1993 and 10 January 1994. It was the appellant, he said, who had failed to take any action in the matter.

We had gone through the authorities cited in detail. Our finding was that there had not been any change of heart over the years, as alleged by learned counsel for the respondent, as regards the considerations when an extension of time should be granted when the period to refer to arbitration had expired. We were, as in the decided cases, of the view that each case must invariably depend on its particular facts before the court can exercise its discretion whether to extend time to refer to arbitration in a situation where time has lapsed.

For this purpose, we need to look at the facts of those cases to understand the reasoning in the respective judgments. In the *Liberian* case *(supra)*, the charterers had expressed their willingness to meet the owners' representative to try to settle things amicably. In fact, for the three months before that, the parties had been in touch over their respective claims. The meeting took place on 27 June 1966, one day after the expiry of the three months period prescribed under cl. 17 of their agreement. No offer was received by 6 July 1966 and so the owners put the matter into the hands of their professional organisation which immediately asked the charterers to agree to an extension. That was not agreed. The owners applied for an extension of time under s. 27 of the Act. An extension of fourteen days was granted by the court but on appeal Donaldson, J refused to extend the time on the grounds that there was no undue hardship but this was overturned by a majority decision in the Court of Appeal for the reasons stated earlier namely that an extension should be granted as negotiations had been taking place all along and immediately after the expiry of the period prescribed and a further delay would not prejudice the charterers.

In the *Safety* case *(supra)*, as had been stated above, the fire occurred on 30 December 1968. The respondent submitted his claim on 15 January 1969 but the appellant did nothing until 25 June 1972 repudiating liability. On these

facts, it was clearly the appellant who had contributed to the delay and both the High Court and the Federal Court agreed that an extension of time should be granted.

In the *Irish* case *(supra)*, the time to refer to arbitration was three months which was later amended to six months. Discharge of the cargo was completed on 18 October 1984 and a number of bags were found to be damaged. Notice of the claims was given to the master and the owners' surveyors at about that time. The time for appointment of an arbitrator expired either on 17 or 18 April 1985. No arbitrator was appointed. On 12 June 1985, the solicitors for the owners telexed the owners club asking them to accept the claim on behalf of the owners. Nine days later, the club replied rejecting the claims as being out of time. There was no reaction by the charterers until 10 September 1985 when the arbitrator was appointed. On 11 September 1985, the charterers applied for the extension under s. 27 of the Act.

In the *Irish* case *(supra)*, both the High Court and the Court of Appeal refused to grant the extension. The delay there was slightly less than a year. The facts in the instant case indicate that the respondent took too long a time to apply for the extension of time, namely three and a half years. We would consider this period inordinate in the circumstances. The fact that the respondent wrote three letters to the appellant at the rate of one per year trying to sort things out would surely not make the delay excusable. The termination of the contract by the appellant was only after a further extension of time had been given to the respondent to complete. There were no meetings held after the termination. With the period of forty five days prescribed in the agreement and with over RM800,000 at stake, we would imagine the first thing on the respondent's mind was to sort out the dispute by referring the matter to arbitration immediately. It is our view that the respondent had placed the hardship upon themselves in these circumstances.

Accordingly, we allowed the appeal with costs here and below, directed that the order of the High Court be set aside, and ordered that the deposit be refunded to the appellant.